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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ARNULFO VASQUEZ,

Plaintiff and Appellants,

v.

JUAN JOSE INTERIANO, et al.,

Defendants and Respondent.

B202120

(Los Angeles County  
Super. Ct. No. PC038508)

ORDER MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed September 2, 2009, is modified to reflect a change in signatories. On page 10 of the typed opinion, delete “We concur: [¶] TURNER, P. J. [¶] KRIEGLER, J.” and replace it with “I concur: [¶] KRIEGLER, J.”

Insert the following on a separate page:

I concur in the affirmance of summary judgment in favor of defendant, Mya Borgman, against plaintiff, Arnulfo Vasquez. I agree with my colleagues there is no evidence Ms. Borgman was negligent. But I respectfully dissent from the determination to reverse the summary judgment in favor of Ms. Borgman against cross-complainant, Juan Jose Interiano. Thus, I would affirm the judgment in its entirety.

The initial issue that warrants discussion is whether the parties and the trial court recognized that Ms. Borgman's summary judgment motion extended to the cross-complaint for indemnity, contribution, apportionment, declaratory relief and contract breach. The notice of motion states that Ms. Borgman is seeking summary judgment or adjudication against plaintiff and cross-complainant. Further, Ms. Borgman's points and authorities argue she owed no duty to plaintiff or cross-complainant. Ms. Borgman's points and authorities concluded by seeking summary judgment or adjudication against plaintiff and cross-complainant. Further, Ms. Borgman's separate statement indicates she is seeking summary judgment or adjudication against both plaintiff and cross-complainant. In her separate statement, Ms. Borgman presented facts indicating she was not negligent—an analysis with which my colleagues and I agree. And, as will be noted, the fact she was not negligent and was entitled to summary judgment on the complaint disposes of the first four causes of action of the cross-complaint. Also, Ms. Borgman asserted in her separate statement of undisputed facts she had no contract to supervise the work of cross-complainant. In that discussion, the following appears in Ms. Borgman's separate statement as undisputed fact No. 26: "There was no contract between JUAN JOSE and MYA BORGMAN requiring MYA BORGMAN to supervise either JUAN JOSE or the Plaintiff, or direct the activities, inspect and prove the work of Cross-Complainant, or remedy sub-standard work. JUAN JOSE testified MYA BORGMAN did nothing more than ask him to cut some branches of palm trees." Undisputed fact No. 26 was accompanied by a citation to cross-complainant's deposition transcript. Attached to Ms. Borgman's separate statement were copies of the complaint and the cross-complaint. Moreover, cross-complainant filed a separate statement in opposition to that presented by Ms. Borgman. And in that opposition separate statement, cross-complainant responds to undisputed fact No. 26: "Disputed. The cited testimony shows that Mya Borgman asked Juan Jose if he could trim her trees, and that Jose told her he could get someone. Nobody but Mya Borgman directed which trees were to be trimmed, and only she could have approved such work." At the July 9, 2007 hearing, after the trial court ruled, the parties acknowledged that Ms. Borgman was no longer a litigant. At no time

during the July 9, 2007 hearing did cross-complainant's counsel raise any lack of notice issue. On October 19, 2007, an amended judgment was entered in favor of Ms. Borgman against cross-complainant.

In my view, cross-complainant had fair notice the summary judgment motion was directed at his cross-complaint: Ms. Borgman's notice of motion and points and authorities so state; undisputed fact No. 26 in Ms. Borgman's separate statement addresses cross-complainant's contract breach claim; the cross-complaint is attached to Ms. Borgman's moving papers; and undisputed fact No. 26, which directly addresses Ms. Borgman's defense against the contract breach claim in the cross-complaint, is addressed in cross-complainant's responsive separate statement. And when the trial court granted Ms. Borgman's summary judgment motion in its entirety on July 9, 2007, cross-complainant's attorney expressed no surprise and interposed no absence of notice objection. Cross-complainant had fair notice his cross-complaint was subject to Ms. Borgman's summary judgment motion.

Second, there is no merit to cross-complainant's first four claims for: complete equitable indemnity; partial equitable indemnity; contribution and equitable apportionment; and declaratory relief. The fourth cause of action for declaratory relief incorporates only the first three causes of action. The declaratory relief claim does not incorporate the fifth cause of action for contract breach.

Much of Ms. Borgman's papers filed in the trial court discuss the absence of any evidence she acted negligently. And with good reason, because if Ms. Borgman is not negligent, she cannot be held liable under the first four causes of action of the cross-complaint. As my colleagues explain, Ms. Borgman was not negligent. Thus, Ms. Borgman is not liable for plaintiff's injuries. Since, Ms. Borgman is not liable for plaintiff's injuries, she owes no duty to indemnify or otherwise equitably contribute to a judgment against cross-complainant. The legal shorthand appearing in many opinions discussing indemnification is there is no indemnity without liability. (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1159; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114.) The first two causes of action are

for complete and partial indemnity. As Ms. Borgman was not negligent, cross-complainant has no right to complete or partial indemnity as is sought in the cross-complaint's first two causes of action. (*Prince v. Pacific Gas & Electric Co.*, *supra*, 45 Cal.4th at p. 1159; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital*, *supra*, 8 Cal.4th at p. 114.)

The third cause of action is for contribution and equitable apportionment. As to contribution, the fact Ms. Borgman was not negligent is dispositive. In order for Ms. Borgman to be held obligated to pay contribution, she first must have a judgment imposed in plaintiff's favor against her. And this is something that can never happen as we have disposed of plaintiff's claims against her because she was not negligent. In order for a right of contribution to arise, there must be a joint judgment against two defendants. (Code Civ. Proc., § 875, subds. (a), (c)<sup>1</sup>; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 596 ["In California the common law rule against contribution among tortfeasors has been modified to the extent of permitting contribution only after a joint judgment against them"]; *Guy F. Atkinson Co. v. Consani* (1963) 223 Cal.App.2d 342, 344 ["Pursuant to section 875 a limited right to contribution became available *where a money judgment has been rendered jointly against two or more defendants in a tort action*"]; see Witkin, Summary of California Law (2005 10th ed.) Torts, § 108, pp. 204-205.) Because plaintiff cannot recover a judgment against Ms. Borgman, she will not be a joint judgment debtor along with cross-complainant. Thus, cross-complainant has no contribution rights against Ms. Borgman in the third cause of action of the cross-complaint.

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<sup>1</sup> Code of Civil Procedure section 875, subdivisions (a) and (c) state: "(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided. [¶] . . . (c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment."

Similarly, cross-complainant has no rights to equitable apportionment, the other theory raised in the third cause of action. Although not as well established as indemnity and contribution principles, equitable apportionment or allocation of loss refers to the trier of fact allocating a percentage of fault to potential joint tortfeasors. In the tort context, the phrase “equitable apportionment or allocation of loss” finds its basis in our Supreme Court decision in *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737, to describe the purpose of the comparative fault rule enunciated in *Li v. Yellow Cab* (1975) 13 Cal.3d 804, 824-829, “[T]he fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.” (See *Baird v. Jones* (1993) 21 Cal.App.4th 684, 690.) Since then our Supreme Court explained equitable apportionment or allocation of loss thusly: “Past California cases have made it clear that the ‘comparative fault’ doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an ‘equitable apportionment or allocation of loss.’” (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313-314 (plurality opn. of George, J.), citing *Daly v. General Motors Corp.*, *supra*, 20 Cal.3d at pp. 734-742.) Here, my colleagues and I agree Ms. Borgman was not negligent and thus none of plaintiff’s injuries can be apportioned to her. Ms. Borgman is not liable under the third cause of action for contribution and equitable apportionment.

Likewise, Ms. Borgman may not be held liable under the declaratory relief cause of action. As noted, the declaratory relief claim incorporates only the first three causes of action, none of which contain allegations of contractual liability. Therefore, as there is no liability under the first three causes of action, Ms. Borgman is entitled to judgment under the fourth cause of action. (*Mackay v. Whitaker* (1953) 116 Cal.App.2d 504, 510.)

As to the fifth cause of action for contract breach, the cross-complaint alleges Ms. Borgman was responsible for coordinating and directing cross-complainant’s work. According to the fifth cause of action, Ms. Borgman failed to adequately coordinate,

direct, inspect and approve cross-complainant's work. Further, the fifth cause of action alleges Ms. Borgman failed to: advise cross-complainant of "defective and/or substandard work"; require "cross-complainant to remedy and/or repair defective and/or substandard work"; and require cross-complainant to "adhere to the plans and specifications for the incident . . . ."

There are two aspects to cross-complaint's contract breach theory. Insofar as cross-complainant alleges the existence of an implied contract requiring Ms. Borgman to supervise the tree-trimming, she is entitled to judgment. In order for Ms. Borgman to be liable to cross-complainant on an implied contract theory, she must have negligently caused plaintiff to be injured. (*Prince v. Pacific Gas & Electric Co.*, *supra*, 45 Cal.4th at p. 1159; *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1029-1030, fn. 10.) And, as noted Ms. Borgman did not act negligently so as to injure plaintiff.

Insofar as the cross-complaint alleges an express contractual relationship, Ms. Borgman has demonstrated no contract existed which required her to coordinate and direct cross-complainant's work; the pertinent allegation in the fifth cause of action. As noted, in her separate statement, Ms. Borgman explicitly denied she contracted to supervise cross-complainant's work. Ms. Borgman relied generally on the circumstances of the accident and the following deposition transcript testimony of cross-complainant. Ms. Borgman asked cross-complainant to cut the branches on the trees. Cross-complainant said he cannot climb trees anymore because he is too fat. Cross-complainant told Ms. Borgman he could get somebody to trim her trees. She was told the price would be \$50 or \$75 per palm trees. Cross-complainant then hired plaintiff. As can be noted, this discussion did not show a contractual duty existed on Ms. Borgman's part to supervise cross-complainant or plaintiff. Thus, the burden of producing evidence shifted to cross-complainant to present specific facts of the contractual relationship with Ms. Borgman. (Code Civ. Proc., § 437c, subd. (p)(2).) The opposition separate statement must cite to specific facts which proves a triable controversy exists. (Code Civ. Proc., § 437c, subd. (b)(3); Cal. Rules of Court, rule 3.1350(h); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 115.) Where the opposition separate statement only presents

speculation in lieu of specific facts, summary judgment must be entered if the burden of production has shifted. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 490; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) As discussed previously, cross-complainant's response is as follows to Ms. Borgman's foregoing showing: "Disputed. The cited testimony shows that Mya Borgman asked Juan Jose if he could trim her trees, and that Jose told her he could get someone. Nobody by Mya Borgman directed which trees were to be trimmed, and only she could have approved such work." Cross-complainant's response does not contain specific facts contradicting Ms. Borgman showing that she merely asked him to hire somebody to trim the trees. Her view of what occurred is entirely different from what is alleged in the cross-complaint. Cross-complainant's separate statement does not set forth specific facts contradicting the evidence cited in her separate statement. For these reasons, I would affirm the judgment.

TURNER, P. J.